

**STATEMENT BY HAROLD C. RELYEA
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NATIONAL EMERGENCIES IN THE UNITED STATES**

Mr. Chairman, thank you for this opportunity to testify on the federal experience with responding to national emergencies and maintenance of the continuity of government. The occurrence of a national emergency often requires the exercise of emergency powers. My statement attempts to explain the origin and character of emergency powers. It also briefly reviews five historical periods rich in the experience of the exercise of emergency powers, including our own contemporary response to terrorist attacks. In this review, I have sought to emphasize the relationships of our three constitutional branches during such times of crisis. In addition, having been apprized of the Subcommittee's interest in continuity of government and the exercise of martial law, I am supplementing my statement with two brief CRS reports on these matters.

Introduction

At various times in American history, emergencies have arisen—posing, in varying degrees of severity, the loss of life, property, or public order—and threatened the well-being of the nation. In response, Presidents have exercised such powers as were available by explicit grant or interpretive implication, or otherwise acted of necessity, trusting to a subsequent acceptance of their actions by Congress, the courts, and the citizenry. Moreover, as the historical record reflects, the response to such emergencies, whether by the executive, legislature, judiciary, or some combination thereof, may bear concomitant dangers for citizens' rights and liberties.

Unlike many other democracies or near democracies, the United States does not suspend its Constitution during times of emergency, whether the condition be war, natural disaster, or economic crisis. Except for the privilege of habeas corpus, the Constitution prescribes no arrangement whereby the rights, governmental structure, or procedures specified in its provisions can be temporarily discontinued, in whole or in part, in order to respond to an exigency. As a nation, our endurance surely owes much to leaders throughout the federal establishment who relied upon “stretch points” of the Constitution in responding to an emergency.

A national emergency may be said to be gravely threatening to the country, and recognizable in its most extreme form as auguring the demise of the nation. The more extreme the threat, likely more widespread will be the consensus that a national emergency exists. However, in political rhetoric, the term, at times, has been artfully used to rally public support, or employed nebulously. According to a dictionary definition, an emergency is “an unforeseen combination of circumstances or the resulting state that calls for immediate action.”¹ In the midst of the crisis of the Great Depression, a 1934 majority opinion of the Supreme Court characterized an emergency in terms of urgency and relative infrequency of occurrence, as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation.² Constitutional scholar Edward S. Corwin once explained emergency conditions as being those “which have not attained enough of stability or recurrency to admit of their being dealt with according to rule.”³ During

Senate committee hearings on national emergency powers in 1973, political scientist Cornelius P. Cotter described an emergency, saying: “It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits.”⁴ The term, he explained, “connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal.”⁵

While other understandings of an emergency could be offered, these are sufficient to provide a sense of the concept. An emergency condition appears to have at least four aspects. First is its temporal character: an emergency is sudden, unforeseen, and of unknown duration. Second is its potential gravity: an emergency is dangerous and threatening to life, property, and well-being. Third, in terms of governmental role and authority, is the matter of perception: who discerns this phenomenon? The Constitution may be guiding on this question, but not always conclusive. Fourth, is the matter of response: an emergency requires immediate action, but is, as well, unanticipated and, therefore, as Corwin noted, cannot always be “dealt with according to rule.” A national emergency is threatening to the nation or some significant portion of its geography, interests, or security.

It should be quickly added that, while some kinds of emergencies may have been unforeseen the first time that they occurred, the federal government, over time, as the historical record bears witness, began taking steps to detect and address subsequent recurrences. The evolution of both civilian and military intelligence capabilities reflects this precautionary development, as do contingency preparations—military and other response plans, as well as standby legal authorities—to facilitate quick and effective counteraction to some kinds of emergency.

Finding the Limits

The exercise of emergency powers had long been a concern of the classical political theorists, including the 17th century English philosopher John Locke, who had a strong influence upon the Founding Fathers in the United States. A preeminent exponent of a government of laws and not of men, Locke argued that occasions may arise when the executive must exert broad discretion in meeting special exigencies or “emergencies” for which the legislative power provided no relief or existing law granted no necessary remedy. He did not regard this prerogative as limited to wartime, or even to situations of great urgency. It was sufficient if the “public good” might be advanced by its exercise.⁶

The Constitution created a government of limited powers, and emergency powers, as such, failed to attract much attention during the Philadelphia convention of 1787 which created the charter for the new government. It may be argued, however, that the granting of emergency powers to Congress is implicit in its Article I, section 8 authority to “provide for the common Defense and general Welfare”; the commerce clause; its war, armed forces, and militia powers; and the “necessary and proper” clause empowering it to make such laws as are required to fulfill the executions of “the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The President was authorized to call special sessions of Congress, perhaps doing so in order that arrangements for responding to an emergency might be legislated for executive implementation.

There is a tradition of constitutional interpretation that has resulted in so-called implied powers, which may be invoked in order to respond to an emergency situation. Locke seems to have anticipated this practice. Furthermore, Presidents have occasionally taken an emergency action which they assumed to be constitutionally permissible. Thus, in the American governmental

experience, the exercise of emergency powers has been somewhat dependent upon the Chief Executive's view of the office.

A President adopting Theodore Roosevelt's "stewardship" theory of office would seemingly have little reservation about exercising implied executive powers. Explaining this view in his autobiography, Roosevelt wrote that he "declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it." On the contrary, it was his belief "that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."⁷

Opposed to this view of the presidency was Roosevelt's former Secretary of War and personal choice for, and actual successor as, Chief Executive, William Howard Taft. The "true view of the Executive functions," in his opinion, was "that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise." Either the Constitution or "an act of Congress passed in pursuance thereof" must convey this specific grant of power. "There is no undefined residuum of power," he concluded, that the President "can exercise because it seems to him to be in the public interest"⁸

Between these two views of the presidency lie various gradations of opinion, perhaps as many conceptions of the office as there have been holders. Generally, however, those holding Roosevelt's "stewardship" view have been more comfortable with a broad exercise of prerogative powers in times of emergency. However, if the authority of a President is largely determined by the incumbent himself, do the constitutional checks of the other two branches have no significance in this regard? To answer this question, the powerful effect of public opinion in times of emergency must be appreciated. If, for example, the nation has been attacked, or a considerable number of Americans have been killed or injured in an overseas assault, such as the sinking of an unarmed ship, public opinion likely will quickly support reprisals ordered by the President as an emergency response. Members of Congress who question the President's authority to take such actions may incur the enmity of the populace. Later, with the passage of time, as military reversals and stalemate occur, casualties increase, diplomatic resolutions fail, and the domestic economy weakens, support for the President's emergency actions may diminish within both the nation and Congress, and constitutional checks may be more freely exercised; tolerance for dissent as an exercise of First Amendment right may increase; and courts may become more accepting of cases questioning and seeking to restrain presidential emergency action.

What are the legitimate powers of the legislative, executive, and judicial branches in times of emergency? One answer to this question is that the legitimate powers of the three branches are those supported by the Constitution—i.e., those explicitly specified, reasonably inferred, or otherwise not prohibited by the fundamental charter. Moreover, there is a political dimension to be taken into consideration as well. There may be exercises of power by the three branches in times of emergency that are constitutionally suspect: they are neither explicitly specified or otherwise prohibited, but opinion is divided as to whether or not they may be reasonably inferred. Nonetheless, they are exercised in the absence of effective opposition by the other branches and with the acceptance, if not the support, of a majority of the public. Such exercises of power are often justified as being "of necessity," and usually are of brief duration. In a few instances, such as President Abraham Lincoln's emergency actions in response to insurrection in the southern states prior to the July 1861 convening of Congress and President Franklin D. Roosevelt's declaration of a "bank holiday"

closing the nation's banking institutions in March 1933, the legislature provided post factum statutory legitimizations of the Chief Executive's exercise of emergency power.

The Historical Record

Since the inauguration of government under the Constitution in the spring of 1789, many instances of the exercise of emergency power have occurred. Among the initial efforts of Congress to legislate emergency authority were acts of September 29, 1789, and May 8, 1792, authorizing the President to call forth the militia of the states, initially, to protect the inhabitants of the frontiers, and, subsequently, to execute federal laws, suppress insurrections, and repel invasions.⁹ The first presidential response to an emergency saw George Washington utilizing the latter statute to mobilize the militia to suppress an insurrection in August 1794. Known as the "Whiskey Rebellion," it was provoked by a federal excise tax on whiskey, which residents of western Pennsylvania, Virginia, and the Carolinas began forcefully opposing. Washington personally took command of the forces organized to put down the rebellion. In the case of the third branch, a critical judicial ruling, not dealing with, but having significant importance regarding, emergency powers, occurred in 1803 when the Supreme Court, in Marbury v. Madison, held an act of Congress unconstitutional for the first time, and established its authority for determining ultimately what is law under the Constitution.¹⁰

Because a systematic review of the exercise of emergency powers during the entire history of the federal government is not possible here, attention is concentrated on five eras rich in such experience—the Civil War, World War I, the Great Depression, World War II, and the current homeland security period.

Civil War

For several decades, controversy and conflict over slavery had steadily grown in the nation until it erupted in regional rebellion and insurrection in late 1860. News of the election of a President known to be hostile to slavery—Abraham Lincoln—prompted a public convention in South Carolina, which met a few days before Christmas and voted unanimously to dissolve the union between that state and the other states. During the next two months, seven states of the Lower South followed South Carolina in secession. Simultaneously, state troops began seizing federal arsenals and forts located within the secessionist territory. In his fourth and final annual message to Congress on December 3, 1860, President James Buchanan conceded that, due to the resignation of federal judicial officials throughout South Carolina, "the whole machinery of the Federal Government necessary for the distribution of remedial justice among the people has been demolished." He contended, however, that "the Executive has no authority to decide what shall be the relations between the Federal Government and South Carolina." Any attempt in this regard, he felt, would "be a naked act of usurpation." Consequently, Buchanan indicated that it was his "duty to submit to Congress the whole question in all its bearings," observing that "the emergency may soon arise when you may be called upon to decide the momentous question whether you possess the power by force of arms to compel a State to remain in the Union." Having "arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government," he proposed that Congress should call a constitutional convention, or ask the states to call one, for purposes of adopting a constitutional amendment recognizing the right of property in slaves in the states where slavery existed or might thereafter occur.¹¹

By the time of President-elect Lincoln's inauguration (March 4, 1861), the Confederate provisional government had been established (February 4); Jefferson Davis had been elected (February 9) and installed as the President of the Confederacy (February 18); an army had been assembled by the secessionist states; federal troops, who had been withdrawn to Fort Sumter in Charleston harbor, were becoming desperate for relief and resupply; and the 36th Congress had adjourned (March 3). A dividing nation was poised to witness, as Wilfred Binkley wrote, "the high-water mark of the exercise of executive power in the United States." Indeed, he continued, "No one can ever know just what Lincoln conceived to be limits of his powers."¹²

A month after his inauguration, the new President notified South Carolina authorities that an expedition was en route solely to provision the Fort Sumter troops, which prompted those state officials to demand that the garrison's commander immediately surrender. He demurred, and, on April 12, the fort and its inhabitants were subjected to continuous, intense fire from shore batteries until they finally surrendered. The attack galvanized the North for a defense of the Union. Lincoln, however, did not straightaway call Congress into special session. Instead, for reasons not altogether clear, he not only delayed convening Congress, but also, with broad support in the North, engaged in a series of actions which intruded upon the constitutional authority of the legislature. Lincoln's rationale for his conduct may be revealed in a comment he reportedly made in 1864: "I conceive I may in an emergency do things on military grounds which cannot constitutionally be done by the Congress."¹³

In a proclamation of April 15, 1861, Lincoln, recognizing "combinations too powerful to be suppressed by the ordinary course of judicial proceedings" or the United States marshals in the seven southernmost states, called 75,000 of "the militia of the several States of the Union" into federal service "to cause the laws to be duly executed." He also called Congress to convene in special session on July 4 "to consider and determine, such measures, as, in their wisdom, the public safety, and interest may seem to demand."¹⁴

Then, in a proclamation of April 19, Lincoln established a blockade of the ports of the secessionist states,¹⁵ "a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war," notes Rossiter.¹⁶ Congress, of course, had not been given an opportunity to consider a declaration of war.

The next day, the President ordered that 19 vessels be added to the navy "for purposes of public defense."¹⁷ Shortly thereafter, the blockade was extended to the ports of Virginia and North Carolina.¹⁸

In a proclamation of May 3, Lincoln ordered that the regular army be enlarged by 22,714 men, that navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated for three-year terms of service.¹⁹ The Constitution, however, specifically empowers only Congress "to raise and support armies."

In his July 4 special session message to Congress, Lincoln indicated that his actions expanding the armed forces, "whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed," he continued, "that nothing has been done beyond the constitutional competency of Congress."²⁰ Indeed, in an act of August 6, 1861, Lincoln's "acts, proclamations, and orders" concerning the army, navy, militia, and volunteers from the states were "approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress."²¹

The 37th Congress, which Lincoln convened in July, initially met for about a month “to consider only the measures necessary to sustain the war effort.” Members returned in December for a second session, which consumed about 200 days of the next year, and a third session, beginning in December 1862, which ended in early March 1863. The President had party majorities in both chambers: about two-thirds of the Senate was Republican and the House counted 106 Republicans, 42 Democrats, and 28 Unionists. The 1862 elections shifted the House balance to 102 Republicans and 75 Democrats. Despite the numerical dominance of the Republicans, presidential leadership was needed for legislative accomplishments because, by one assessment, within the House and the Senate, “no one individual or faction was able to establish firm control of the congressional agendas during the Civil War.” A crucial factor in Lincoln’s dealings with legislators was his role as “chief patronage dispenser in the American political system” and his serving, as well, as “a kind of court of last resort to whom congressmen could appeal lower-level decisions or whom they might use to manipulate the federal system to their particular advantage.”²²

Investigation and oversight activities by congressional committees increased during the Civil War, “when 15 of 35 select committees were primarily concerned with wrongdoing or improper performance of duties,” and similar probes were being conducted by at least six standing committees. The war affected these inquiries because it added urgency to proper administrative performance and prompted enlarged federal expenditures. There were, as well, committee examinations of matters more closely connected with the war. The House Committee on the Judiciary, for example, investigated loyalty problems, including the conduct of some Members of the House, and telegraphic censorship of the press. The House Select Committee on the Loyalty of Clerks and Other Persons Employed by Government left many distressed when it solicited the views of faithful, longtime department employees regarding their colleagues and sought the dismissal of federal workers without allowing an opportunity for confronting accusers or rebutting allegations of disloyalty. The House Special Committee on Government Contracts also proved to be controversial due to members’ energetic righteousness concerning contracting practices.²³ Perhaps the best known of the wartime overseer panels was the Joint Committee on the Conduct of the War, which has undergone some reevaluation by historians in recent years. While some of its tactics—secret testimony, leaks to the press, disallowance of an opportunity to confront or cross-examine accusers—and its bias against West Point officers remain unacceptable, its probes of the Fort Pillow massacre, in which Union black troops were murdered and not allowed to surrender, and the poor condition of Union soldiers returned from Confederate prisons “were among its more positive achievements.” One historian concluded that “a number of its investigations exposed corruption, financial mismanagement, and crimes against humanity,” with the result, he affirms, that the panel “deserves praise not only for exposing these abuses but also for using such disclosures to invigorate northern public opinion and bolster the resolve to continue the war. Had the committee’s work always been modeled on these investigations,” he offered, “there would be little debate about its positive, albeit minor, contribution to the Union war effort.”²⁴ Overall, however, congressional overseers appear to have had little restraining effect on the presidential exercise of emergency powers.

In his efforts at suppressing the rebellion of the southern states, Lincoln regarded his war power as including “the right to suspend the habeas corpus privilege; the right to proclaim martial law; the right to place persons under arrest without warrant and without judicially showing the cause of detention; the right to seize citizens’ property if such seizure should become indispensable to the successful prosecution of the war; the right to spend money from the treasury of the United States without congressional appropriation; the right to suppress newspapers; and the right to do unusual things by proclamation, especially to proclaim freedom to the slaves of those in arms against the Government.” In these actions, observed historian James G. Randall, Lincoln “was as a rule, though not without exception, sustained by the courts.”²⁵

At the time of Lincoln's assumption of the presidency, the federal courts had collapsed in the states in rebellion, and those finding themselves in war zones either temporarily suspended operations or succumbed to declarations of martial law and trials by military tribunals. Many of the federal judges serving in the North, Northwest, and West probably were sympathetic to the new President's antislavery position, but that did not mean that they would necessarily support his exercise of war powers to take extraordinary actions. Similarly, there was uncertainty about how the Supreme Court would evaluate Lincoln's actions to quell the rebellion. The Court, and particularly Chief Justice Roger B. Taney, had disgraced itself, in the view of many Americans, and engendered the enmity of the Republican party with its Dred Scott decision in 1857.²⁶ When Lincoln was inaugurated, there was one vacancy on the Court due to a death; a month later, death claimed another justice; soon thereafter, a third vacancy occurred when a justice resigned to join the Confederate cause. Later, in 1862, Congress created a tenth seat on the Court.²⁷ Thus, Lincoln had four opportunities to fashion a Supreme Court likely to be supportive of his presidency.²⁸

Although Chief Justice Taney declared in May 1861 that the President had improperly suspended the habeas corpus privilege, his ruling was rendered on circuit when military authorities refused to honor his writ for John Merryman.²⁹ Nonetheless, his opinion provided a warning, one clearly understood by the Attorney General, who warned the Secretary of War in January 1863 against seeking Supreme Court review of a Wisconsin case involving the President's suspension power.³⁰ About a month later, Congress gave final approval to a statute authorizing the President, "during the present rebellion," to suspend habeas corpus.³¹ Under the provisions of the act, officers in charge of prisons were required to obey a judge's order for release, and those against whom no violation of federal law was charged could not be held. Also, lists of those political prisoners arrested in the past, as well as those incarcerated in the future, were required to be kept and furnished to the courts. However, Randall concluded "that the act was not carried out in sufficient degree to make any noticeable difference in the matter of the arrest, confinement, and release of political prisoners."³²

Arbitrary arrests and the use of the military as both policemen and courts continued in certain areas throughout the war. Because of the controversy they engendered, the administration took pains to explain and justify their utilization, and, beginning in February 1862, to temper criticism with grants of amnesty.³³ Court tests of the President's authority in these matters were avoided; Congress reacted by creating the office of Judge Advocate General in July 1862 to supervise all courts martial and military commission proceedings.³⁴ In the Vallandigham decision of 1864, the Supreme Court avoided constitutional issues posed by the exiled treasonist, who had been convicted by a military commission, and ruled narrowly that it lacked jurisdiction for an appeal from a military tribunal.³⁵ Finally, one year after the end of the Civil War in April 1865, the Supreme Court, noting that "the late wicked Rebellion" had not allowed "that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question," unanimously declared that military commissions, in an uninvaded and nonrebellious state, in which the federal courts are open and functioning, "had no jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service."³⁶

In contrast to these developments was the Supreme Court's ruling in the Prize Cases almost two years after the beginning of the war, "deemed the most significant decision the Court handed down during the conflict."³⁷ Technicalities aside, the case posed the key question of the President having authority to impose a blockade of southern ports without congressional authorization. If the President's action was determined to be illegal, a vast amount of restitution might have to be paid. In addition, Lincoln wanted the blockade to be sustained as a response to a rebellion rather than a

war, the latter condition constituting something of an invitation to foreign powers to recognize and assist the Confederacy. Ultimately, a 5-4 majority, which included three Lincoln appointees, supported the President's action and his rebellion theory.³⁸

Reviewing the emergency period of the Civil War, scholars generally have concluded "that neither Congress nor the Supreme Court exercised any very effective restraint upon the President."³⁹ The actions of the Chief Executive were either unchallenged or sanctioned by Congress, and were either justified, or, because of no opportunity to render judgment, went without evaluation by the Supreme Court. Regarding the other two branches, Lincoln sought support for, or approval of, his actions when he thought he could obtain it, and avoided situations where disapproval might result. In pursuing this strategy, he was always keenly aware of popular approval of his presidency. For the remainder of the century and throughout the next, no President would exercise emergency powers in quite the same way or under quite the same crisis conditions as did Lincoln.

World War I

When war swept over Europe during the latter months of 1914, the United States, in terms of emergency conditions confronting the nation as a whole, was unaffected by the conflict. The presidential contest of 1912 had resulted in the election of Woodrow Wilson, the first Democrat to occupy the White House since 1897. His party held a substantial margin of seats (291-127) in the House at the start of his administration, which quickly dwindled during the next two Congresses and disappeared in 1918; an initial seven-seat margin in the Senate grew slightly during the next two Congresses before the opposition gained a two-seat majority in 1918. The Supreme Court greeting Wilson was largely conservative and, although it had given the commerce clause a little broader reading in the early years of the century, it continued to hold a narrow view of the Constitution's protection of individual rights. Associate Justice Edward D. White was elevated to the position of Chief Justice in 1910; President Wilson would appoint three members of the High Court during his two terms. In March 1913, Wilson embarked on regularly-scheduled conferences with the Washington press corps, an innovation reflective of his intention to gauge, mold, and lead public opinion.

During the initial months of the war in Europe, the United States adopted a policy of neutrality, but a little later, in September 1915, Wilson reluctantly agreed to allowing American bankers to make general loans to the belligerent nations. These loans, foreign bond purchases, and foreign trade tended to favor Great Britain and France. Earlier, in February 1915, Germany proclaimed the waters around the British Isles a war zone which neutral ships might enter at their own risk. In May, the transatlantic steamer Lusitania, a British vessel, was sunk by a German submarine with the loss of 1,198 lives, including 128 Americans. Disclosures of German espionage and sabotage in the United States later in the year, unrestricted submarine warfare by Germany as of February 1917, and March revelations of German intrigue to form an alliance with Mexico contributed to the President calling a special session of Congress on April 2, when he asked for a declaration of war, which was given final approval four days later.⁴⁰

As Wilson led the nation into war, the "preponderance of his crisis authority," commented Clinton Rossiter, "was delegated to him by statutes of Congress." It was a new style in the exercise of emergency power.

Confronted by the necessity of raising and equipping a huge army to fight overseas rather than by a sudden and violent threat to the Republic, Wilson chose to demand express legislative authority for almost every unusual step he felt impelled to take. Lincoln had shown what the

office of the President was equal to in crises calling for solitary executive actions. Now Wilson was to show its efficacy as a crisis instrument working along with the legislative branch of the government. The basis of Lincoln's power was the Constitution, and he operated in spite of Congress. The basis of Wilson's power was a group of statutes, and he cooperated with Congress.⁴¹

The President also exercised certain discretionary authority in addition to that provided by statute, but he did so in a manner which generally did not antagonize the legislature. For example, he armed American merchantmen in February 1917; created a propaganda and censorship entity in April 1917—the Committee on Public Information—which had no statutory authority for its limitations on the First Amendment; and he created various emergency agencies under the broad authority of the Council of National Defense, which had been statutorily mandated in 1916.⁴²

“Among the important statutory delegations to the President,” recounted Rossiter, “were acts empowering him to take over and operate the railroads and water systems, to regulate and commandeer all ship-building facilities in the United States, to regulate and prohibit exports, to raise an army by conscription, to allocate priorities in transportation, to regulate the conduct of resident enemy aliens, to take over and operate the telegraph and telephone systems, to redistribute functions among the executive agencies of the federal government, to control the foreign language press, and to censor all communications to and from foreign countries.”⁴³

Although Rossiter thought “limitations on American liberty in World War I were ridiculously few,” others strongly disagreed.⁴⁴ His mentor and subsequent faculty colleague, Robert E. Cushman, for example, proffered that “the record of our behavior with respect to civil liberties during World War I is not one in which the thoughtful citizen can take much pride or satisfaction.”⁴⁵ Although Congress, perhaps with a view to self-protection, refused to give the President authority to censor the American press, it did enact other laws, at Wilson's request, to truncate freedom of expression. Chief among these was the Espionage Act to regulate the mails and punish those using the postal system to disseminate information advocating or urging treason, insurrection, or forcible resistance to federal law, and to punish spies and those making false reports or communications with intent to interfere with armed forces operations or “to promote the success” of the enemy; causing insubordination, disloyalty, mutiny, or refusal of duty in the armed forces; or willfully obstructing armed forces recruitment or enlistment.⁴⁶ Another was the Trading with the Enemy Act, which expanded the censorship powers of the Postmaster General and authorized censorship (implemented through a presidential board) of “communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country.”⁴⁷ A third, enacted in 1918, was the Sedition Act, which amended the Espionage Act, to punish those making false reports or statements with intent to interfere with armed forces operations or “to promote the success” of the enemy; obstructing the sale of war bonds; causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces; willfully obstructing armed forces recruitment or enlistment; willfully uttering, printing, writing, or publishing “any disloyal, profane, scurrilous, or abusive language” about the American form of government, the Constitution, the armed forces or their uniforms, or the flag, or using any language intended to bring any of these into contempt, scorn, contumely, or disrepute; willfully uttering, printing, writing, or publishing “any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies”; willfully displaying the flag of any foreign enemy; willfully uttering, writing, printing, publishing, or speaking to “urge, incite, or advocate any curtailment” of war production; or supporting or favoring, by word or act, “the cause of any country with which the United States is at war” or opposing the cause of the United States when at war.⁴⁸

By one account, the Department of Justice pursued 2,168 prosecutions under the Espionage Act and the Sedition Act, with 1,055 convictions resulting.⁴⁹ In a First Amendment challenge, the Supreme Court unanimously sustained the Espionage Act, Associate Justice Oliver Wendell Holmes laying out, in the opinion of the Court, his famous “clear and present danger” test for determining the limits of First Amendment protection of political speech.⁵⁰ A unanimous Court also upheld the Sedition Act shortly thereafter, with Holmes again writing the Court’s opinion.⁵¹ Several months later, however, the Court divided 7-2 in another Sedition Act case, with Holmes in the minority.⁵²

Among the most zealous administration censors was Postmaster General Albert S. Burleson, who, by one estimate, “exercised his power of censorship with a high hand, excluding from the mails publications which only by far-fetched lines of reasoning could be held to be in violation of the statute.”⁵³ In the view of another analyst, “Burleson used censorship as a bludgeon with which to destroy the left-wing press.”⁵⁴ For example, “about sixty Socialist papers lost their second-class mailing privileges,” and “[m]any lesser papers ceased publication.”⁵⁵

The Wilson Administration also engaged in secret surveillance of the American populace, using the army and a private citizen organization—the American Protective League—in these efforts, giving special attention not only to Socialist, labor, and pacifist organizations, but also to African-American groups.⁵⁶

In November 1918, Republican majorities were elected to both houses of Congress, and an armistice was signed in Europe, bringing a cessation of warfare. As peace negotiations, with Wilson participating, began in Paris in mid-January, many temporary wartime authorities began to expire; most of the remaining war statutes and agencies were terminated by an act of March 3, 1921.⁵⁷

The Great Depression

In his final state of the union message, transmitted on December 4, 1928, President Calvin Coolidge advised the legislators that no previous Congress “has met a more pleasing prospect than that which appears at the present time,” and concluded that the “country can regard the present with satisfaction and anticipate the future with optimism.”⁵⁸ One year later, the dreamworld envisioned by Coolidge vanished and was replaced by a nightmare. When the new President, Herbert Hoover, called a special session of Congress on April 15, 1929, to deal with farm relief and a limited revision of the tariff, the stock market evidenced nervousness. Prices continued to rise during the summer months; individual issues did well; and speculation in securities continued. However, as prices rose, so too did the volume of speculation. When the increases in the brokers’ loans were criticized, there was sharp response against such “prophets of doom.” Nevertheless, it was the twilight of an illusion which came to an abrupt end on October 24, 1929, beginning with an incredible deluge of selling in the stock market. Much of it was probably forced selling, necessitated by “the beautifully contrived system whereby the stock gambler whose margin was exhausted by a fall in the market was automatically sold out,” and “became a beautifully contrived system for wrecking the price structure.” Panic ensued. “In poured the selling orders by hundreds and thousands; it seemed as if nobody wanted to buy; and as prices melted away, presently the brokers in the howling melee of the Stock Exchange were fighting to sell before it was too late.”⁵⁹ Rapidly, it became too late.

Economic crisis was not new to America. The country had experienced financial setbacks of nationwide proportion in 1857, 1875, and 1893. History, however, was an enemy in the devising of strategy to deal with the depression of 1929. The periods of economic difficulty of the past were but a tumble when compared with the plunge of the Great Depression. This was the first problem experienced by those attempting to rectify the plight of the country: they did not recognize the

ramifications of the situation or the extent of damage done and continuing to be done. Perhaps, too, the administrative machinery was not available or sufficiently developed to halt the downward economic spiral. It may have been that the President's philosophy of government was inadequate for meeting the exigency.⁶⁰ In the face of all efforts to halt its progress, the economic disaster continued to devastate American society.

The depression demoralized the nation: it destroyed individual dignity and self-respect, shattered family structure, and begged actions which civilized society had almost forgotten. In brief, it created a most desperate situation, ripe for exploitation by zealots, fanatics, or demagogues. It also created an emergency which, unlike exigencies of the past, dealt a kind of violence to the public that neither armed forces nor military weaponry could repel. It was an new type of crisis leading to a broad extension of executive power.

In 1932, a malcontent and despairing electorate voted against Herbert Hoover. Although a dedicated public servant of demonstrated ability, Hoover was replaced with Franklin D. Roosevelt, who came to the presidency from the governorship of New York and previous service as Assistant Secretary of the Navy during the Wilson Administration. The vice presidential nominee of the Democratic party in 1920, he was struck down by a severe attack of infantile paralysis in 1921, but remained politically active and made a dramatic nomination speech endorsing Al Smith at the Democratic national convention of 1924. He again put Smith in nomination as the party's presidential candidate in 1928. Smith won the nomination, but lost the election; Roosevelt was elected governor of New York.

In his inaugural address, the new President was eloquent, telling the American people "that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance." More important, on the exertion of leadership during crisis, he expressed hope that the normal balance of executive and legislative authority would prove to be adequate "to meet the unprecedented tasks before us," but acknowledged that "temporary departure from that normal balance" might be necessary. "I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require," he said, but, in the event Congress did not cooperate "and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me"—using "broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."⁶¹

The day after his inauguration, Roosevelt called for a special session of Congress. When the proclamation for the gathering was issued, no purpose for the March 9 assembly was indicated. Nonetheless, the President's party enjoyed overwhelming majorities in the House (310-117) and Senate (60-35). Roosevelt had arrived in Washington with drafts of two proclamations, one calling for the special session of Congress and the other declaring a so-called "bank holiday," which would temporarily close the nation's banks and restrict the export of gold by invoking provisions of the wartime Trading With the Enemy Act.⁶² The bank holiday proclamation was issued on March 6. Between the evening of the inauguration and the opening of Congress, Roosevelt's lieutenants, aided by Hoover's Secretary of the Treasury, Ogden Mills, drafted an emergency banking bill. When Congress convened, the House had no copies of the measure and had to rely upon the Speaker reading from a draft text. After 38 minutes of debate, the House passed the bill. That evening, the Senate followed suit. The President then issued a second proclamation, pursuant to the new banking law, continuing the bank holiday and the terms and provisions of the March 6 proclamation.

Thereafter ensued the famous Hundred Days when the 73rd Congress enacted a series of 15 major relief and recovery laws, many of which provided specific emergency powers to the President or broad general authority to address the crisis gripping the nation. The Emergency Banking Relief Act, for example, authorized the President to declare a condition of national emergency and, “under such rules and regulations as he may prescribe,” regulate banking and related financial matters affecting the economy. This statute also continued the Chief Executive’s authority to suspend the operations of member banks of the Federal Reserve System.⁶³ Under the authority of the Civilian Conservation Corps Reforestation Relief Act, the President was granted broad power “to provide for employing citizens of the United States who are unemployed, in the construction, maintenance, and carrying on of works of a public nature in connection with the forestation of lands belonging to the United States or to the several States.” Authority also was granted to house, care for, and compensate such individuals as might be recruited to carry out programs established pursuant to the act.⁶⁴ After declaring the existence of a national emergency with regard to unemployment and the disorganization of industry, the National Industrial Recovery Act authorized the President to establish an industrial code system and a public works program to facilitate the restoration of prosperity. The President could establish administrative agencies to carry out the provisions of the act, and might delegate the functions and powers vested in him by the statute to those entities.⁶⁵

Although Congress was willing to provide President Roosevelt emergency authority to bring about the economic recovery of the nation, the Supreme Court soon indicated that some legislative responses to the depression did not pass constitutional muster. The National Industrial Recovery Act was struck down in 1935 for making unconstitutional delegations of legislative power to the President and, in one case, as well, for improperly relying upon the interstate commerce clause to regulate local commerce. Furthermore, the Court was not swayed by the government’s contention that the legislation was justified by the national economic emergency.⁶⁶ The following year, in a 6-3 decision, the Court declared a tax provision of the Agricultural Adjustment Act an invasion of the reserved powers of the states, a violation of the 10th Amendment.⁶⁷ These rulings prompted the President to propose an enlargement of the Court’s membership in 1937, a proposition about which many Democratic Members of Congress had misgivings. The Court, however, suddenly signaled a change of thinking which produced a new majority more favorably inclined toward statutes supporting the administration’s recovery efforts.⁶⁸ Moreover, by the end of 1940, Roosevelt had appointed five new justices to the Court.

World War II

The formal entry of the United States into World War II occurred on December 8, 1941, with a declaration of war against Japan in response to the attack on Pearl Harbor in the Hawaiian Islands that had occurred the previous day.⁶⁹ Three days later, on December 11, war was declared against Germany and Italy.⁷⁰ As a result of the 1940 elections, President Roosevelt had been returned to office for an unprecedented third term, and his party held large majorities in the House (267-162) and Senate (66-28).

During Roosevelt’s first and second presidential terms (1933-1940), as totalitarian regimes began threatening the peace of Europe and Asia, Congress adopted a series of Neutrality Acts restricting arms shipments and travel by American citizens on the vessels of belligerent nations.⁷¹ Two months after war commenced in Europe in September 1939, Congress, at the President’s request, modified the neutrality law by repealing the arms embargo and authorizing “cash and carry” exports of arms and munitions to belligerent powers.⁷² Some advanced weapons—aircraft carriers and long-range bombers—were procured for “defensive” purposes. More bold during the period of professed neutrality was the President’s unilateral transfer of 50 retired American destroyers to Great

Britain in exchange for American defense bases in British territories located in the Caribbean. The President also negotiated a series of defense agreements whereby American troops were either stationed in foreign territory or were utilized to replace the troops of nations at war in nonbelligerent tasks so that these countries might commit their own military personnel to combat. Such was the case with Canada when, in August 1940, it was announced that the United States Navy, in effect, would police the Canadian and American coasts, providing mutual defense to both borders. Canadian seamen would, of course, be released to aid the British navy. In April 1941, American military and naval personnel, with the agreement of Denmark, were located in Greenland. In November, the Netherlands concurred with the introduction of American troops into Dutch Guiana.

With the declarations of war and the impending international crisis, Roosevelt, in Rossiter's estimate, became "a President who went beyond Wilson and even Lincoln in the bold and successful exertion of his constitutional and statutory powers." Congress "gave the President all the power he needed to wage a victorious total war, but stubbornly refused to be shunted to the back of the stage by the leading man." Exemplary among the various congressional committees playing a watchdog role during the war was the Senate Special Committee to Investigate the National Defense Program.⁷³ The Supreme Court "gave judicial sanction to whatever powers and actions the President and Congress found necessary to the prosecution of the war, and then post bellum had a lot of strong but unavailing things to say about the limits of the Constitution-at-War."⁷⁴

While the First War Powers Act authorized the censorship of American communications with foreign countries, the domestic press and radio were controlled by a strictly voluntary and extra-legal Censorship Code.⁷⁵ A few seditious or nearly-seditious publications, like Father Charles E. Coughlin's Social Justice, were suppressed by the Postmaster General. The most serious civil liberties violation to occur during the war—although it was not widely criticized at the time—was the internment, at the President's order, of some 110,000 Japanese Americans, an estimated 70,000 of whom were legal citizens of the United States, in special camps. Congress supported the internment directive by legislating a misdemeanor penalty for any action in violation of the restrictions laid down by the President, the Secretary of War, or designated military subordinates.⁷⁶ The Supreme Court supported the constitutionality of these actions.⁷⁷ The Court, meeting in special session, also rejected the habeas corpus applications of seven German saboteurs captured on American soil and prosecuted in secret proceedings by a military tribunal. Six of the prisoners were executed a little more than a week later.⁷⁸ When the presidency of Franklin D. Roosevelt came to an end on April 12, 1945, with his sudden death in Warm Springs, Georgia, his experience in the exercise of emergency powers during wartime had been one of little restraint by Congress or the federal courts, and, with the significant exception of the forced internment of the Japanese Americans, of respect for constitutionally guaranteed rights.

Homeland Security

Nine months after his inauguration, President George W. Bush was confronted by an emergency resulting from terrorist attacks, using hijacked passenger airliners, on the World Trade Center in New York City and the Pentagon in northern Virginia. At the time of the attacks, the 107th Congress was in session, the President's party having majority control of the House (221-212), but minority status in the Senate (49-50). While the President would request congressional enactment of some remedial legislation to address the emergency, he also had available a rich legacy of statutory powers to draw upon. These included, for example, the response and recovery program authorities of the Federal Emergency Management Agency,⁷⁹ as well as standby provisions which could be selectively activated pursuant to the National Emergencies Act with a national emergency declaration.⁸⁰

A few hours after the attacks on the World Trade Center and the Pentagon occurred, American armed forces around the world were brought to the highest level of readiness; the Capitol complex and the West Wing of the White House were evacuated; all aircraft flights within the United States were suspended; most federal employees around the country were sent home; all domestic financial markets were closed; and military defenses for Washington and New York were strengthened. A few days later, President Bush formally declared a national emergency and activated provisions of law authorizing the call up of the Ready Reserve and other retired or separated armed services personnel.⁸¹ That same day, Congress completed action on a \$40 billion emergency assistance package for counterterrorism and rescue efforts,⁸² and enacted a joint resolution authorizing the President to use all necessary force in retaliation for the terrorist attacks.⁸³ On September 19, President Bush ordered the deployment of more than 100 advanced aircraft to the Persian Gulf region as part of the initial buildup of U.S. military forces poised for retaliatory action for the September 11 attacks. Four days later, the President again declared a national emergency, invoked the International Emergency Economic Powers Act, and ordered its implementation to begin freezing the assets of individuals and organizations believed to be involved in activities threatening U.S. security interests.⁸⁴ On October 7, American and British aircraft and warships began air assaults against suspected terrorist bases and targets in Afghanistan.

To facilitate the coordination of homeland security policy and its implementation, President Bush issued an October 8 order establishing the Office of Homeland Security (OHS) within the Executive Office of the President and creating the Homeland Security Council.⁸⁵ Later that day, he appointed former Pennsylvania Governor Tom Ridge to head OHS. On October 26, the President signed the USA Patriot Act giving law enforcement officials new powers to investigate and detain suspected terrorists, including controversial surveillance authority.⁸⁶ A few days later, a new Department of Justice rule authorizing the Bureau of Prisons to monitor communications between suspected terrorist inmates and their attorneys prompted protests from trial lawyers, the American Bar Association, and civil liberties organizations.⁸⁷ Simultaneously, Department of Justice detentions, refusals to name publicly those detained, and cessation of the issuance of detention tallies also spawned objection and counter tactics.⁸⁸ So, too, did the President's November 13 military order authorizing the creation of special military tribunals to try suspected international terrorists and their collaborators.⁸⁹ However, these matters appeared to be the only ones resulting in any serious conflict between the President and Congress concerning his response to the terrorism emergency during the six months after the September 11 attacks.

Retrospective

As the historical record recounted here suggests, Congress and the federal courts have not been very effective counterweights to exercises of emergency power by the President.⁹⁰ Judges, as was acknowledged by the Supreme Court in the Milligan case, may defer, delay, or rule narrowly on presidential emergency actions until the period of crisis has passed. Congress also may choose this course as well, as it did when it legislatively terminated unnecessary war statutes and agencies in 1921. In addition, when enacting legislation vesting emergency authority in the executive, Congress may include a sunset provision automatically terminating the statute on the occasion of a particular event or condition marking the end of the emergency, such as the establishment of an armistice or the ratification of a peace treaty. For many years, Congress has legislated standby delegations of emergency authority which could be activated with a formal national emergency declaration. In 1976, with the National Emergencies Act, Congress created procedural arrangements for such declarations, limited their effects to selective activation of standby authorities, and provided itself with a means to cancel unwarranted national emergency declarations or inappropriate activations of

standby authorities. Finally, through its power of the purse, Congress may restrain or scale down executive actions responding to a national emergency. This was done abruptly and drastically after the November 1918 armistice in Europe, with unfortunate consequences for American national defense programs; a better model may be found in congressional support of demobilization and reconversion of the economy to peacetime conditions in 1944, 1945, and the immediate years after the end of World War II. Ultimately, the Constitution and the form of government it guarantees have survived many national emergencies in the life of the nation, the three branches not always being in equal check and balance with one another during these periods of crisis, just as they may not be in less perilous times.

Notes

1. Henry Bosley Woolf, ed., Webster's New Collegiate Dictionary (Springfield, MA: G & C Merriam, 1974), p. 372.
2. Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 440 (1934).
3. Edward S. Corwin, The President: Office and Powers, 1787-1957, 4th revised edition (New York: New York University Press, 1957), p. 3.
4. U.S. Congress, Senate Special Committee on the Termination of the National Emergency, National Emergency, 93rd Cong., 1st sess., hearings, Apr. 11, 1973 (Washington: GPO, 1973), p. 277.
5. Ibid., p. 279.
6. Thomas I. Cook, ed., Two Treatises of Government, by John Locke (New York: Hafner, 1947), pp. 203-207; Edward S. Corwin, The President: Office and Powers, 1787-1957, pp. 147-148.
7. Theodore Roosevelt, Theodore Roosevelt: An Autobiography (New York: Macmillan, 1913), pp. 388-389.
8. William Howard Taft, Our Chief Magistrate and His Powers (New York: Columbia University Press, 1916), pp. 139-140.
9. 1 Stat. 95, 264.
10. 5 U.S. 137 (1803).
11. James D. Richardson, A Compilation of the Messages and Papers of the Presidents, Vol. 7 (New York: Bureau of National Literature, 1897), pp. 3165-3167.
12. Wilfred E. Binkley, President and Congress (New York: Alfred A. Knopf, 1947), p. 126.
13. George Fort Milton, The Use of Presidential Power, 1789-1943 (Boston, MA: Little, Brown, 1944), p. 111; contemporary legal support for this point of view may be found in a treatise by the solicitor of the Department of War, William Whiting, War Powers Under the Constitution of the United States (Boston, MA: Little, Brown, initially published 1862).
14. Richardson, A Compilation of the Messages and Papers of the Presidents, Vol. 7, pp. 3214-3215.
15. Ibid., pp. 3215-3216.
16. Clinton Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (Princeton, NJ: Princeton University Press, 1948), p. 225.
17. Ibid.
18. Richardson, A Compilation of the Messages and Papers of the Presidents, Vol. 7, p. 3216.

19. Ibid., pp. 3216-3217.
20. Ibid., p. 3325.
21. 12 Stat. 326.
22. Allan G. Bogue, The Congressman's Civil War (Cambridge, UK: Cambridge University Press, 1989), pp. xiv-xv, xviii, 57.
23. Ibid., pp. 60-88.
24. Bruce Tap, Over Lincoln's Shoulder: The Committee on the Conduct of the War (Lawrence, KS: University Press of Kansas, 1998), pp. 253, 255; also see Elisabeth Joan Doyle, "The Conduct of the War, 1861," in Arthur M. Schlesinger, Jr., and Roger Bruns, eds., Congress Investigates: A Documented History, 1792-1974, Vol. 2 (New York: Chelsea House/R. R. Bowker, 1975), pp. 1197-1232; E. B. Long, "The True Believers: The Committee on the Conduct of the War," Civil War Times Illustrated, 20 (August 1981): 20-27; William Whatley Pierson, Jr., "The Committee on the Conduct of the Civil War," American Historical Review, 23 (April 1918): 550-576; Hans L. Trefousse, "The Joint Committee on the Conduct of the War: A Reassessment," Civil War History, 10 (March 1964): 5-19; Howard C. Westwood, "The Joint Committee on the Conduct of the War—A Look at the Record," Lincoln Herald, 80 (Spring 1978): 3-15; T. Harry Williams, "The Committee on the Conduct of the War: An Experiment in Civilian Control," Journal of the American Military Institute, 3 (Fall 1939): 139-156.
25. James G. Randall, Constitutional Problems Under Lincoln, revised edition (Urbana, IL: University of Illinois Press, 1951), pp. 36-37.
26. Scott v. Sandford, 60 U.S. 393 (1857); one of the most important cases in American constitutional history, the 7-2 decision, which played a major role in precipitating the Civil War, was rendered for the majority by Chief Justice Taney, who ruled that Scott remained a slave, that Congress exceeded its authority when it forbade or abolished slavery in the territories because no such power could be inferred from the Constitution, and that slaves were property protected by the Constitution; see Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (New York: Oxford University Press, 1978).
27. 12 Stat. 794.
28. See David M. Silver, Lincoln's Supreme Court (Urbana, IL: University of Illinois Press, 1956), pp. 1-13, 84-85.
29. Ex parte Merryman, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861); see Silver, Lincoln's Supreme Court, pp. 28-36.
30. See Randall, Constitutional Problems Under Lincoln, p. 132; Silver, Lincoln's Supreme Court, pp. 123-125.
31. 12 Stat. 755-756.
32. Randall, Constitutional Problems Under Lincoln, p. 166.

33. See Silver, Lincoln's Supreme Court, pp. 119-129, 131-137, 147-155, 227-236; Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties (New York: Oxford University Press, 1991).
34. 12 Stat. 598.
35. Ex parte Vallandigham, 68 U.S. 243 (1864).
36. Ex parte Milligan, 71 U.S. 2 (1866).
37. Silver, Lincoln's Supreme Court, p. 104.
38. 67 U.S. 635 (1863); see Silver, Lincoln's Supreme Court, pp. 104-118.
39. Randall, Constitutional Problems Under Lincoln, p. 517; for concurrences with this view, see Binkley, President and Congress, pp. 124-127; Rossiter, Constitutional Dictatorship, pp. 233-234; and Woodrow Wilson, Constitutional Government in the United States (New York: Columbia University Press, 1907), p. 58.
40. 40 Stat. 1.
41. Rossiter, Constitutional Dictatorship, p. 242.
42. Concerning the Committee on Public Information, see Stephen L. Vaughn, Holding Fast the Inner Lines: Democracy, Nationalism, and the Committee on Public Information (Chapel Hill, NC: University of North Carolina Press, 1980); concerning the Council of National Defense, its mandate may be found at 39 Stat. 649-650 and its operations are discussed in Grosvenor B. Clarkson, Industrial America in the World War: The Strategy Behind the Line 1917-1918 (Boston, MA: Houghton Mifflin, 1923); also see, generally, William Franklin Willoughby, Government Organization in War Time and After (New York: D. Appleton, 1919).
43. Rossiter, Constitutional Dictatorship, p. 243.
44. Ibid., p. 253.
45. Robert E. Cushman, "Civil Liberty After the War," American Political Science Review, 38 (February 1944): 6; also see Zechariah Chafee, Jr., Free Speech in the United States (Cambridge, MA: Harvard University Press, 1941), especially Part I; Paul L. Murphy, World War I and the Origin of Civil Liberties in the United States (New York: W. W. Norton, 1979).
46. 40 Stat. 217.
47. 40 Stat. 411.
48. 40 Stat. 553.
49. Harry N. Scheiber, The Wilson Administration and Civil Liberties, 1917-1921 (Ithaca, NY: Cornell University Press, 1960), pp. 61-63.
50. Schenck v. United States, 249 U.S. 47 (1919).

51. Debs v. United States, 249 U.S. 211 (1919).
52. Abrams v. United States, 250 U.S. 616 (1919).
53. Carl Brent Swisher, American Constitutional Development (Boston, MA: Houghton Mifflin, 1943), p. 610.
54. Scheiber, The Wilson Administration and Civil Liberties, 1917-1921, p. 32.
55. Dorothy Ganfield Fowler, Unmailable: Congress and the Post Office (Athens, GA: University of Georgia Press, 1977), p. 115.
56. See Mark Ellis, Race, War, and Surveillance: African Americans and the United States Government During World War I (Bloomington, IN: Indiana University Press, 2001); Joan M. Jensen, Army Surveillance in America, 1775-1980 (New Haven, CT: Yale University Press, 1991); Joan M. Jensen, The Price of Vigilance (Chicago, IL: Rand McNally, 1968); Theodore Kornweibel, Jr., Seeing Red: Federal Campaigns Against Black Militancy (Bloomington, IN: Indiana University Press, 1998).
57. 41 Stat. 1359.
58. Fred L. Israel, ed., The State of the Union Messages of the Presidents, 1790-1966, Vol. 3 (New York: Chelsea House/Robert Hector, 1966), p. 2727.
59. Frederick Lewis Allen, Since Yesterday: The Nineteen-Thirties in America (New York: Harper and Brothers, 1940), pp. 23-24; also see John Kenneth Galbraith, The Great Crash, 1929 (Boston, MA: Houghton Mifflin, 1954).
60. See Gene Smith, The Shattered Dream: Herbert Hoover and the Great Depression (New York: William Morrow, 1970).
61. Franklin D. Roosevelt, The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 2: The Year of Crisis, 1933 (New York: Random House, 1938), pp. 11, 15.
62. Arthur M. Schlesinger, Jr., The Coming of the New Deal (Boston, MA: Houghton Mifflin, 1959), p. 4.
63. 48 Stat. 1.
64. 48 Stat. 22.
65. 48 Stat. 195.
66. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
67. See United States v. Butler, 297 U.S. 1 (1936).
68. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
69. 55 Stat. 795.

70. 55 Stat. 796, 797.
71. 49 Stat. 1081, 1152; 50 Stat. 121.
72. 54 Stat. 4.
73. See Donald H. Riddle, The Truman Committee: A Study in Congressional Responsibility (New Brunswick, NJ: Rutgers University Press, 1964); Harry A. Toulmin, Jr., Diary of Democracy: The Senate War Investigating Committee (New York: Richard R. Smith, 1947); Theodore Wilson, "The Truman Committee, 1941," in Arthur M. Schlesinger, Jr., and Roger Bruns, eds., Congress Investigates: A Documented History, 1792-1974, Vol. 4 (New York: Chelsea House, 1975), pp. 3115-3136.
74. Rossiter, Constitutional Dictatorship, p. 265; for a catalog of emergency powers granted to the President during the period of the war, see U.S. Library of Congress, Legislative Reference Service, Acts of Congress Applicable in Time of Emergency, Public Affairs Bulletin 35 (Washington: Legislative Reference Service, 1945).
75. 55 Stat. 838.
76. 56 Stat. 173.
77. See Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Ex parte Endo, 323 U.S. 283 (1944); Peter Irons, Justice at War (New York: Oxford University Press, 1983).
78. Ex parte Quirin, 317 U.S. 1 (1942).
79. See 42 U.S.C. 5121 et seq.
80. See 50 U.S.C. 1601 et seq.
81. Proclamation 7463, Federal Register, 66 (Sept. 18, 2001): 48197-48199.
82. 115 Stat. 220.
83. 115 Stat. 224.
84. E.O. 13224, Federal Register, 66 (Sept. 25, 2001): 49079-49082, invoking 50 U.S.C. 1701 et seq.
85. E.O. 13228, Federal Register, 66 (Oct. 10, 2001): 51812-51817.
86. 115 Stat. 272.
87. See Federal Register, 66 (Oct. 31, 2001): 55061-5506; George Lardner, Jr., "U.S. Will Monitor Calls to Lawyers," Washington Post, Nov. 9, 2001: A1, A16; Jerry Seper, "Criminal Defense Lawyers Object to Eavesdropping Rule," Washington Times, Nov. 10, 2001: A2; George Lardner, Jr., "ABA Urges Ashcroft to Kill Order," Washington Post, Jan. 4, 2002: A10.

88. See Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," Washington Post, Nov. 9, 2001: A16; Dan Eggen, "About 600 Still Detained in Connection with Attacks, Ashcroft Says," Washington Post, Nov. 28, 2001: A16; Jerry Seper, "Ashcroft Won't Bend on Arrests," Washington Times, Nov. 28, 2001: A1, A8; "Rights Groups Sue for Detainee Details," Washington Post, Dec. 6, 2001: A4; Dan Eggen, "Delays Cited in Charging Detainees," Washington Post, Jan. 15, 2002: A1, A8; Dan Eggen, "Long Wait for Filing of Charges Common for Sept. 11 Detainees," Washington Post, Jan. 19, 2002: A12; Hanna Rosin, "Groups Find Ways to Get Names of INS Detainees," Washington Post, Jan. 31, 2002: A16; Hanna Rosin, "Lawsuit Filed Over Immigration Hearings' Closing," Washington Post, Jan. 30, 2002: A7.
89. See Federal Register, 66 (Nov. 16, 2001): 57833-57836; Joseph Curl, "President Approves Trials by Military," Washington Times, Nov. 14, 2001: A1, A10; George Lardner, Jr., and Peter Slevin, "Military May Try Terrorism Cases," Washington Post, Nov. 14, 2001: A1, A12; Peter Slevin and George Lardner, Jr., "Bush Plan for Terrorism Trials Defended," Washington Post, Nov. 15, 2001: A27; George Lardner, Jr., "Democrats Blast Order on Tribunals," Washington Post, Nov. 29, 2001: A22; George Lardner, Jr., "Legal Scholars Criticize Wording of Bush Order," Washington Post, Dec. 3, 2001: A10; Frank J. Murray, "Justice to Use FDR Precedent for Military Tribunals," Washington Times, Dec. 5, 2001: A1, A11.
90. A notable exception, outside of the emergency periods considered here, is Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

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